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CALIFORNIA★POLITICAL
REVIEW
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This is America, Not Albania
Arnold Steinberg joins the Coastal Commission

Trouble for Capizzi's *Werft* prosecution?

Tim Ferguson Locates Respect for the Readers

The State Supreme Court Rehears *American Academy of Pediatrics v. Lungren*

THE COURT'S WAR ON THE FAMILY

Snatching Defeat From The Jaws of Victory

Mark S. Pulliam

The View From The Bench

An exclusive interview with
The Honorable Ronald M. George

Californians Prepare to Reform Their Merit-Blind Government
by Terry Eastland

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The PARENTS RIGHTS Coalition

FOR STRONG FAMILIES AND THE RULE OF LAW

THE PARENTS RIGHTS COALITION exists to demonstrate the breadth and depth of popular support and legal justification for California's law — once upheld, but now subjected a second time to Supreme Court review — requiring minor children to obtain their parents', or a judge's, permission before an abortion is performed on them.

BACKGROUND

This law was passed in 1987 by a Democrat-controlled Legislature recognizing and encouraging parents' central role in leading children toward responsible adulthood. Signed by Governor George Deukmejian, it is supported by Governor Pete Wilson and its constitutionality was upheld last April in a state Supreme Court opinion written by the Court's most liberal member, Stanley Mosk. Similar laws have been held constitutional by the U.S. Supreme Court and 70 percent of Americans believe parents have both the right and the responsibility this law enjoins.

But a tiny minority of abortion absolutists persuaded a newly-sworn-in majority of the state high Court to vote May 22 to re-hear the case. Even though state law requires minors under 18 to obtain parental consent before obtaining a driver's license or using a tanning facility, Attorney General Dan Lungren, whose office won this battle once, must now prepare to fight it a second time.

QUESTIONS RAISED — ACTION DEMANDED

The re-hearing threatens trust among parents and children. It undermines parental responsibility and strong families. It calls into question the constitutionality of curfew laws and other efforts to restore social stability for young Californians. Rulings that flip-flop with changes in Court membership undermine judicial independence and the rule of law. Democratic institutions are undermined when extreme political factions use the judiciary to impose their will on all of us. And, finally, what does it mean to say that, even within families, some questions (abortion, say) belong outside any definable moral framework, that we should never ask: Is it right?

If the people are not informed about what the Court is doing to them, Attorney General Lungren will fight alone against heavy odds to save this popular law. That's why The Parents Rights Coalition will sponsor a public education program including establishing a statewide FAX network and Speakers Bureau, and will publish definitive defenses of the law, and the arguments of its opponents, by recognized, responsible, articulate experts, and distribute them throughout the state.

Most Californians believe in strong families, responsible parents, and judges who serve, rather than make, the law. It is time to be counted.

Join The Parents Rights Coalition today.

For information, call (805) 445-9183

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CORRESPONDENCE

Attacks and Plaudits

A hearty "Amen" to your Commentary, "Well-Earned Accolades," (*CPR*, May/June) for Pat Nolan and Bill Saracino. Conservative leaders like Pat and Bill have willingly dedicated their lives, fortunes, and sacred honor to upholding the pillars of American freedom, yet far too seldom hear the praise they deserve. Kudos for balancing principled attacks on the liberal enemy with plaudits for our conservative friends and colleagues.

Douglas R. Boyd
Glendora

Despicable Reference

I must strongly object to G.B. Tennyson's casual reference ("Ghosts in the Machines," Criticus, *CPR*, May/June) to Ulysses S. Grant as a "besotted old butcher." This is despicable. I thought you people were Republicans. Does he turn on Abraham Lincoln next? How about "War is Hell" William T. Sherman? Is he aware of who won the Civil War and which side the Republicans were on? But perhaps that is the problem.

I would note, in regard to the "besotted" part, that Lincoln said he would like to send Grant's brand of liquor to all his generals; and I would also note, in regard to the "butcher" part, that Robert E. Lee, the man who ordered Pickett's Charge, told his staff to stop talking about Grant that way. Grant was one of the great generals of history; and if his battles in the Virginia campaign were bloody, it was because Lee was also a good enough general to counter Grant's flanking maneuvers. What impressed Lincoln the most was just that Grant stuck to it and fought — unlike other Union generals who didn't fight or who lost their nerve. We might still be sitting on the Rapidan if Grant had not pushed on after The Wilderness. Grant deserves better than a tomb covered with graffiti and contempt from his Party successors.

Kelley L. Ross
Philosophy Dept., L.A. Valley College

G.B. Tennyson replies:

Mr. Ross's objections seem to rest entirely on matters other than whether U.S. Grant was in fact as I characterized him, a point which Ross virtually concedes. He thinks contributors to *CPR* are supposed to be Republicans and that Republicans are supposed to support Grant, Lincoln, Sherman, and all their works and ways because, well, they won the War. This is victor's history with a vengeance and, if applied consistently, would oblige us to think Attila the Hun a better man than his luckless opponents and presumably Pilate a greater leader than Christ. They were both on winning sides at the time. As were many other scoundrels.

Or possibly Mr. Ross means not that we must extol Grant *et al.* but only that we ought speak no ill of them, rather in the spirit of Ronald Reagan's Eleventh Commandment. That policy, well-intentioned as it may have been, was directed to politicians during election time and largely ignored by them anyway (*cf.* Bush's "voodoo economics" during his primary struggles with Reagan, for which he was rewarded with the vice-presidency, which led ultimately to the presidency itself: Criticus should be so punished). But these exhortations to Party piety have no claim on independent writers, who may or may not be Republicans in any case. (At least one of us here at *CPR* is a monarchist.) Nor should such counsel be pressed too far on the national level lest the Republican Party chase away the region of its greatest strength, namely the South, which has not been famed for its reverence for Mr. Ross's heroes. Apparently Mr. Ross hasn't noticed the shifts in Party allegiance since the days of the Grand Army of the Republic, but the times, they are a-changed.

I regret that Grant's tomb is graffiti covered, as I should regarding the defacement of any public monument that by its very existence represents civic dignity and respect, whether the person honored deserves it or not by my lights. I wonder how many such shrines in the South are comparably defiled .... But I can assure Mr. Ross that I had nothing to do with the desecration on Riverside Drive and that it even preceded my piece in *CPR*, so

(Please turn to page 28)

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SACRAMENTO SPECTATOR

The dog days of summer up here in your Capitol ... but, as the natives endlessly repeat, "at least it's dry heat", a motto your *Spectator* is convinced is emblazoned over the portals of Hades. None the less, there are several juicy items to pass on, picked up at the stylish *soirées* and gin palaces frequented by yours truly.

First item concerns the new state budget. Conservatives should stop whining about it. It is by far the best of the Wilson years and better than most of gorgeous George Deukmejian's. It has new abortion restrictions for the first time in anyone's memories, some new business incentives to keep the ol' Golden Bear economy competitive, trims around the edges of some welfare entitlements, and in general is as fiscally sound as can be produced with the Bolsheviks controlling the state Senate.

Is it perfect? No. Is it better than the Democrat proposals? By a long shot. Precious little credit goes to Governor Petey, whose staff is posturing him on the absurd notion that the vice presidency is still a possibility. (No kidding, the double-starched shirt & Gucci loafer set in the gov's *sanctum sanctorum* really believe this!!!) Agreeing to this budget has pained him deeply, but the "Pete Wilson is really, really a conservative" masquerade must continue at least until the GOP national convention. Virtually all the credit goes to the hardy band of conservatives who dominate the Assembly at the moment. By and large they hung tough, and have produced a budget that is significantly better than its predecessors.

Next item concerns some intrigue amongst the aforementioned stalwarts in the Assembly. Seems that Tricia Hunter — the ferociously pro-abortion former member from San Diego who is the GOP nominee for the Assembly seat currently held by Democrat Dede Alpert (Alpert is running for the state Senate) — has been having "war council" meetings with other pro-abort current members and nominees. The aim is to "blow apart" the Assembly GOP's current prolife consensus.

Latest sighting of this cabal was in Sacramento, with participants Hunter, current Assembly members Jim Cuneen and Brooks Firestone, and GOP nominees in the districts currently held by Jim Rogan and Ted Weggeland. Speaker Pringle and his leadership know of the meetings, but are not yet sure what to do about them.

Last item is about *Bee* columnist Dan Walters, Sacramento's own Macy's Thanksgiving parade hot air balloon. The ever bilious Walters recently shocked folks by coming to the defense of the Assembly GOP after they were smeared by the *L.A. Times* on the issue of staff salaries and spending now that they run the lower house. Walters defending conservatives is like Jesse Jackson joining the Aryan Nation. What gives? Some folks attributed it to the "stopped clock" syndrome — not even Walters can be wrong *all* the time. Others were convinced the uremic acid flowing through his veins had finally reached the brain, eviscerating his knee-jerk contempt for things conservative or thoughtful.

Another interesting explanation was offered by one of Walters' colleagues who suggests that for some years now, Danny boy has felt his true genius is smothered under the bushel basket of Sacramento's small media market. He is said to yearn — yea, verily to lust — after the exposure that could be provided in a major newspaper with national credentials. But the *L.A. Times* (in what certainly must be the only correct decision made by its editors in the last decade), has several times allegedly rejected Walters' entreaties to be hired on with that paper. A favorite mentor of your *Spectator* is fond of saying "time wounds all heels." Nice to see it happen to one of Sacramento's biggest.

— *A.P.C.*

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Diddling With the Rules

Trojans, Bruins shocked to find defiling of the Educational Temple

WILLIAM R. ALLEN

Spring 1996 was not a gratifying time for purportedly higher education in California. Foremost, there was the failure of the UCLA basketball team to survive the first round of the NCAA tournament, losing to (pardon the expression) Princeton. But there is additional disconcerting evidence of academic decay and deterioration.

Consider, if you have the stomach for it, the preparation and prospects of customers entering the California State University system. The latest statistics are consistent with seemingly perennial reports: the young scholars, however bright they may be, commonly have not been adequately tutored for college-level work. Many know little, and can do little; about half are basically illiterate in both English and mathematics — and the level of incompetence continues to rise yearly.

Those who are unprepared are not rejected; they are directed to remedial classes. But, unusually, The *Los Angeles Times* here has it right: "...a four-year college is not the appropriate place for remedial education."

There is, of course, a pecking order in the academy. While CSU campuses do have some first-rate faculty and students, they lack the public stature and the professional eminence of a UCLA or even a USC. Surely, these latter institutions of glamor fairly reek of sophistication, being communities of scholars who assiduously pursue the Life of the Mind.

Well, they do reek. And, again, the *Times* caught the scent. The cultural ideal is a healthy mind in a healthy body. USC, with uncommon adaptability and sensitivity, until recently offered a course largely for gladiators who may have no minds. The course's subject matter was daunting, viz., Tutoring Methods; and the clientele is elite, mainly varsity athletes. So jocks who are concerned primarily, if not exclusively, with playing games are led to a course in teaching. But be assured that they are up to the challenge: they are not required to attend class meetings, to do any work, or to take any exams — and everyone passes, almost all with grades of A. Those who received lower grades, and how they managed to earn them, were not revealed.

Administrators at USC were *shocked,* of course, to learn of such defiling of the educational temple. The course and its tenured teacher had long been under suspicion, but, we are told, an investigation had been terminated because it was rumored that the professor had already retired.

A USC vice provost acknowledged massive "administrative incompetence" in the affair. But some who wrote letters to the editor of the *Times* were entirely forgiving. After all, only one class seems to have been involved, and they know that such peccadilloes are found on *every* campus — even in the Ivy League — and sin which is ubiquitous is not really sinful.

UCLA (along with Berkeley) has its own little scandal. There the current problem is not how to keep beefy studs athletically eligible without requiring academic performance, but how to select clientele who are to get into the place. How are the scarce campus openings to be allocated?

What one deems to be appropriate admissions criteria and procedures reflects what one perceives the university properly to be. For some of us, the university is to be an oasis for thought, study, research, writing, creativity, learning, teaching, and training. There is a breathtaking variety of significant problems, prospects, issues, and concerns to be pursued, analyzed, and exposited. There is sophisticated work to be done, and all — regardless of skin color, sex, nationality, religion, or net worth — are welcome to participate if they are intellectually and psychologically equipped to contribute. In gathering the most competent, accomplished, and promising people — faculty and students — to con-

William R. Allen derisively and gallantly laughs in the face of improper pressure at UCLA.

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duct enquiries, pursue visions, and enhance productivities, appropriate "diversity" will take care of itself.

Alas, high and refined intellect and creativity characterize few who compose, administer, and manipulate the machinery of college admissions. At best, the existing admissions game is a mess. There is much ridiculousness in the rules, which admit no more than 60 percent of UCLA freshmen on solely academic criteria and which aim at a student body that closely mirrors irrelevant characteristics of the immediately surrounding community. Now, it is discovered — again, by the *Times,* which is on a roll — that there have been indelicate improprieties in diddling with the rules.

Variously Beautiful People of the Establishment — including chancellors, regents, politicians, and Daddy Warbucks types — have promoted special consideration for marginal (and sub-marginal) candidates for admission. Sometimes the personal pressure has succeeded.

The initial response of the chief administrators at UCLA was regret, not over prostitution of his institution, but over "unauthorized" exposure of the evidence. And then he employed the USC defense: (a) the number of applicants involved is relatively *small,* and (b) some amount of back-door favoritism, some caving in to Beautiful People, is found *everywhere.*

It seems true that the shenanigans at UCLA and USC are not crimes or large numbers. Rather, they are a shaming of decorum and a corrupting of integrity and a diluting of probity and credibility. But it is difficult to explain good taste and uncompromised courage to those who have little of either. CPR

THE WORKING PRESS

A Little Respect for the Readers

TIM W. FERGUSON

MARK WILLES was part of an inflation-fighting cadre back in his days at the Minneapolis Federal Reserve Bank. And here he is, still beating down prices — lowering by half the newsstand hit for his company's flagship, the *Los Angeles Times.* The CEO of Times Mirror Corp. apparently looked at a drop in street sales of the gray lady from more than 200,000 to less than 90,000 and decided that 50 cents was more than she had coming. Now the price is back to a quarter, which is what most papers were before the industry convinced itself a few years ago that it was letting readers steal it blind. (It's also what the *Times* still cost in competitive areas such as Orange County.) So we'll see whether the problem for Willes's newspaper is its price or the growing gulf between its white liberal culture and the politically and ethnically polyglot market it serves.

Along those lines, Willes made one interesting observation to a Columbia Journalism School alumni audience, reported in the latest big "whither the *Times?*" article, this one in the *New York Times.* Willes was responding to critics of the "almost reverential" (*NYT's* words) coverage in the *Baltimore Sun* (another Times Mirror paper) of the Pope's visit to that city. "You don't give up your credibility by treating your readers with respect," Willis said. Suburbanites in Orange County and elsewhere in the circulation area of Willes' *Times,* folks whose values are disdained by so many in the urban journalistic ranks, will be interested to see what that attitude at the top portends.

Another name in the news at the *Times* these days is Michael Parks, the new managing editor. Winner of the 1987 Pulitzer Prize for foreign coverage, he was chosen over home-office powergals Narda Zacchino and Carol Stogsdill (the latter made the *Times'* Sacramento coverage what it is today). Parks is an authoritative fellow, though what his appointment will herald for the tone and substance of coverage is likely to be re-

Tim W. Ferguson is California Political Review's *press critic.*

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vealed only in the same slow way that Willes is affecting the *Times*. One thing his underlings believe is that Parks is eclipsing much of the newsroom role of Shelby Coffey, the titular editor. It was *Times* publisher Richard Schlosberg and not Coffey who announced Parks to the staff. Coffey is identified with the "diversity" style book and other concessions to the PC Zeitgeist, so his distancing from the newsroom would appear at first blush to be heartening to conservatives.

All of which is not to say that the *Times* has quit being the *Times*. Take, for example, the serial chronicle of the week-long California AIDS Ride down the coast. Probably the only people more glad to see this 525-mile journey end than the sore-saddle riders themselves were the readers of the *Times*, who had to endure Mack Reed's ongoing tale of weepy men (hurting for their lovers and friends, not their butts), ugly bigots and wonderfully supportive families. No one begrudges a charity raising funds for the pitiful sufferers from this — or any other — disease, but only the best AIDS coverage avoids an undertone of moral lecture (to the benighted broader public) and self-absorption on the part of homosexual activists. This series did not escape those defects. How about similar Page 3 spreads for the next march against muscular dystrophy?

One result of the diminished content space (a cost-cutting move) at the *Times* recently has been the omission of the paper's liberal local pundits from the Metro section of the main edition. And if the Life & Style section finally bites the dust, as rumored, then lefty columnist Robin Abcarian will be homeless. It's amazing how losing a few pounds can make you feel better.

You can't blame lack of space for the *Times's* paucity of spot-news photos. For years, perhaps because it wants to set itself above tabloid journalism, the *Times* has only sparingly depicted thugs charged in street crimes or figures in celebrated court cases (the O.J. trial was unavoidably an exception), or most political candidates, for that matter. Compare this policy with, say, the *San Francisco Chronicle*. The *Chron* carried the pix of Richard Allen Davis flipping off Polly Klass's family on its front page, for example; the *Times*, not at all. Photos of Sacramento Capitol affairs in the biggest paper in the state? Forget it. Even when a few porno starlets lobbied the Legislature in June — a photo-op if ever there were one — the *Times* relied only on text. But this time your faithful correspondent was able to find no other metro paper succumbing to the salacious impulse, either. Nuts! Has the press gone prudish?

There's big news elsewhere in Los Angeles, where the free weeklies are gearing up to give the *Times*, the *Daily News*, and the *Orange County Register* more needed competition. The *LA Weekly*, owned by the Hartz pet products king who also has the *Village Voice* in New York, is bumping up its press run by 20,000, to about 200,000. The *Weekly* is your standard left critique of the political and business establishment, which nevertheless yields some surprises. (It recently had a cover piece blasting the "whole language" instructional approach favored by the teacher's unions.) The *Weekly* not long ago started a sister paper in Orange County, which immediately set upon Representatives Robert Dornan, Dana Rohrabacher, and Chris Cox with nonstop venom. (It also, however, chronicled how a born-again Christian woman who was president of the *Times's* Orange County edition spoke unguardedly to a Westmont College audience about what it was like working in her very secular world. She was called on the carpet at headquarters and ultimately left the company.) Meanwhile, back in LA, one of the other free weeklies has been bought by the New Times publishing chain of Phoenix, which owns the *SF Weekly* in San Francisco. That paper has tried to twit the standard leftism of the *Bay Guardian*, so the new Los Angeles product may do the same to *LA Weekly*. The New Times owners call themselves small-L libertarians, and it's very small-L, to be sure. But they can stir the pot. Curiously, they hired a couple of ex-desk editors at the *Times* to be their top guys in Los Angeles.

The other big start-up story is the California regional supplement to the *Wall Street Journal*, which after a long delay is now set to begin this fall. The *Journal* has published similar weekly add-ons to the regular *Journal* in Texas and Florida, filling them with stories on regional business and politics. The pattern has been to hire a junior staff to do these editions. Editor of the California *Journal* will be Rick Wartzman, who'll move from the paper's notorious Washington bureau. Wartzman formerly covered military contractors from Los Angeles. He is a solid journalist and (surprise!) of a liberal cast. CPR

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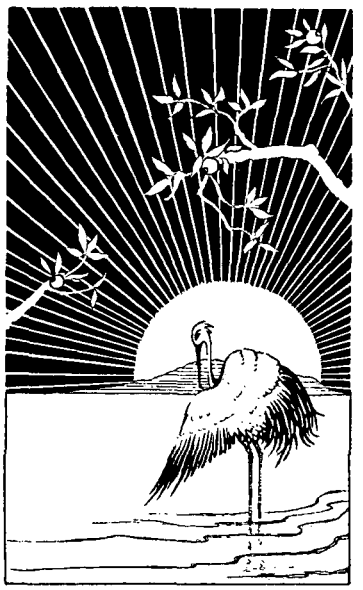
BUREAUCRACY WATCH

We live in America, not Albania

BY ARNOLD STEINBERG

In May, Assembly Speaker Curt Pringle named four new California Coastal Commissioners, including Calabasas resident Arnold Steinberg, and set off a flood of Democrat hyperbole. Santa Monica Assemblywoman Sheila Kuehl said Pringle showed an "anti-preservation, anti-consumer-use, and anti-coastline attitude." Not only that, she thought the appointments "cynical" and "completely inappropriate" to boot. Unquestionably, something interesting was afoot, and so it proved to be. Following are remarks Mr. Steinberg delivered June 12, at *his first meeting as a Commissioner. If he achieves even a part of the objectives he outlines, the Commission's petty tyrants are in for rough weather.*



We are here to serve the people of California. That means all of the people, not the wealthy and powerful with political connections, or property rights groups or environmentalists, but the people, especially those that come before us each month. Many believe that the former Coastal Commissioner in prison for corruption is the only one who got caught. We can show them that he's the exception. There are good and honest people who work for the Coastal Commission. These dedicated professionals should welcome reform. In fact, in the last few years, there has been improvement, but too much remains to be done.

Still, there is too much power in the hands of the Coastal Commission, the executive director, the staff. And it has been abused. That's why we need to do more than make the trains run on time; we need to keep the trains from running over our citizens. We need big changes very soon to assure openness, fairness, and due process. This Commission has become a revolving door for too many Commissioners, staff, and other hangers-on to represent so-called "developers" or so-called "environmentalists." We need to hear more from the people who want the permits, less from their high-paid agents. How sad that someone who builds a home needs to retain a lawyer to come here.

We must focus on the big picture — for example, urban sewage into the ocean. We must make people or companies pay if they impose external costs on the rest of society, and find creative ways to involve the private sector in solving these problems.

Commissioners should not preside over fiefdoms in their area or trade votes. Coastal Commission staff should be polled, and the results processed by an independent firm, to determine which Commissioners have ever contacted them about specific cases. Such contacts should be discouraged and put on the record. Staff should report contacts from supporters and opponents of a permit or amendment, whether from the Sierra Club or a property rights group — the staff member could quickly complete a contact form for the record. This also will prevent staff members in enforcement actions from claiming that nonexistent meetings or conversations occurred.

I guess that raises the issue of *ex parte* communications. We're supposed to be quasi-judicial. I won't ask Assembly Speaker Pringle or his staff, and I don't expect them to instruct me, how to vote. And I'm considering whether to avoid all communications from anyone on a specific permit, unless they are on the record. Everyone here — Coastal Commissioners, staff, proponents, and opponents, should testify under oath. Opinion is opinion. But don't lie, because you'll no longer get a free ride in what we claim is a quasi-judicial proceeding.

We should not have a Coastal Commission executive director or staff recruiting or coaching people to testify at these hearings. It's not only wrong, it's insulting when these letters and statements bear an obvious staff fingerprint. Do we have to endure the spectacle of show trials, in which professional witnesses or people from Central Casting are brought here to prevent someone from moving into their neighborhood?

We need streamlined operations in every respect, from the agenda of these meetings to management and administration and staffing. We need an ombudswoman or ombudsman to keep things moving. We're here to process permits in accord with the law, not to twist the law in an arbitrary and inconsistent manner to make life difficult for our fellow citizens.

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The process must be accelerated; there are too many people who went years to get a permit. We need to recognize those staff members who do work hard to help these people. And let's reward staff for honesty in owning up to a mistake, instead of trying to cover it up.

Coastal Commission meetings are too long and too unfriendly. We may need legislative or policy changes to get us out of the business of resolving disputes between neighbors which should be solved by them, or local government. Let's bring enforcement out in the open — public hearings, not executive session. Let the accused know his or her accusers and the charges. We live in America, not Albania. We should devote our time to major Coastal issues, not the size of someone's driveway. How curious that Hollywood tycoons who would find censorship so objectionable might have us censor how their neighbor's home would look. I wonder: does it really makes sense for the Commission even to deal with single family homes? To my friends in Malibu who want to tell their neighbor what color to paint his house, I say if you want to bully your neighbor, do it locally, not through this Commission.

I was shocked to learn that the Coastal Commission uses outmoded Wang machines, rather than personal computers — an incredible loss in productivity. Personal computers should have been installed long ago. The budget should have been cut elsewhere, or I and other commissioners will try to get them donated. The staff reports should be shorter, perhaps put on E-mail and, when published, on recyclable paper. We need to monitor the budget for the Commission. If funds come from foundations or other sources, we need a separate accounting and to check for conflicts of interest.

The Coastal Commission must act lawfully. I find little consistency in its decisions. When the Commission wants to do something, the Commission *says* it is consistent with the Coastal Act; when it doesn't want to do something, it *says* it is inconsistent with the Coastal Act. Maybe there is a better way. Perhaps current commission policies should be part of the administrative law code, requiring review by the Office of Government Law for constitutionality and legality.

We need an independent mail survey of past applicants, perhaps for the past 10 years — those who were granted or denied permits or amendments, those who were or were not the subject of enforcement. Questions should include whether they were treated fairly and responsively; whether the person has knowledge of bias or favoritism on the part of any Coastal Commissioner or staff member, or whether any Commissioner or staff member made any false statements in a staff report or enforcement proceeding. We also want to know the good things and positives about the way they were treated and how our staff performed well, and we want ideas for improvement and change. We would ask a major accounting firm, as a public service, to monitor and tabulate the results.

Let's talk about the so-called "special conditions": easements in which someone "of his own free will" gives up 85 percent of his or her property. These strike me as the kind of "voluntary" confessions exacted in a totalitarian country. Perhaps we want each person to submit a sworn statement before the Coastal Commission that the condition was agreed to freely and voluntarily.

We make people sign a special condition releasing this Commission from liability due to granting a permit to that person to build in a fire-hazardous area. If we do this, let's stop engaging in a shell-game, in which we deny people the opportunity to comply with county fire department requests.

Let's deal with the "mitigation" hoax, in which the Commission staff uses the vagueness of the Coastal Act to define alleged shortcomings, and such shortcomings are magically "mitigated" by the owner's self-deprivation of his property. We need a mailing sent to past applicants asking if they acquiesced to any special condition giving away usage of their land, to secure the permit. If someone says yes, then let's reopen the proceedings, because that means the Coastal Commission has been involved in legalized theft!

Let's stop pretending: if government or some group cannot or will not buy someone's property, let's not maneuver for this Commission to stall the permit process for years, then use the lack of a permit to say the property's value is diminished, and try to buy it on the cheap. If a private developer conspired in that way to defraud someone, he'd be in jail.

I'm deeply troubled by irrevocable deed restrictions. They remind me of restrictive covenants long ago that said someone could not sell to a Jew or to a black. They are involuntary servitude. We need to investigate what has been done, un-do them if we can, and stop doing any more.

The Fifth Amendment says no one shall be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.* The California Constitution says private property may not be taken or damaged for public use unless compensation has been paid to the owner. Court decisions are clear: government must pay fair value if it condemns property for public use.

Finally, we cannot have the staff or the executive director lobby before any governmental body unless they have the approval of, and represent the policy of, the Commission. The amount of power granted by the state Legislature to the executive director is a threat to the separation of powers and undercuts the ability of members of this Commission to exercise their fiduciary responsibility.

To the able and dedicated lawyers from the Office of Attorney General: you are counsel to the people of California, only then to the Coastal Commission, and, lastly to the staff. Tell us how to comply with the law, not how to evade it

We have a solemn responsibility here. Those who pretend they are in touch with nature ought to understand this Commission operates by virtue of force, not by virtue. It's time to return to a rule of morality and law. CPR

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Calm Before the Storm

As Orange County trial dates approach, a judge forces release of key Registrar's office correspondence. It could tip the scales on charges of 'selective prosecution' leveled against Capizzi.

Leon McKinney

For now, a calm seems to have settled over District Attorney Michael Capizzi's investigations and prosecutions of prominent Orange County political figures Assemblyman Scott Baugh, Baugh Chief of Staff Maureen Werft, and others. With several trials set to begin within the next several weeks, however, the calm will almost certainly give way to new storms soon. In the meantime, the basic question remains: did the accused actually commit genuine violations of law, sufficiently serious to justify the vast expense, diversion of law enforcement resources, and damage to reputations and lives that has already occurred, or is Capizzi making a special case of these defendents, possibly for political reasons of his own?

The DA steadfastly maintains he is only doing what he must under the law. "We don't concern ourselves with the political ramifications of what we do," the *Orange County Register* quoted Capizzi as saying in March. "We simply react to the conduct of others. If people commit criminal acts we're going to respond." He is echoed by San Mateo County DA and California District Attorneys Association President James P. Fox. "It is clear," Fox wrote in an April *Register* letter to the editor, "that for a number of years there has been a 'single standard' in political corruption cases in Orange County: vigorous prosecution of anyone who violates the law, based upon facts and law. No consideration is given for politics."

As Lyn Nofziger once said of George Bush's "read my lips" pledge, such categorical denials of political motivation don't leave "any wiggle room" for those pronouncing them: "We don't concern ourselves with the political ramifications," "No consideration is given for politics," and so forth, means flatly: nothing, *nada,* never. Perhaps they protest too much. It is, after all, plain nonsense to pretend that elected officials, particularly those widely spoken of, as Capizzi is, as prospective candidates for Attorney General, either do not *or should not* ever think of the political impact of what they do. We wouldn't vote for our prosecutors, we'd appoint them as the federal government does, if we believed they should *never* think about voters' reactions to their conduct.

The issue, of course, is not whether *any* political considerations are involved, but whether Capizzi sometimes allows political (or some other) considerations to outweigh considerations of justice. The *Capizzistas* routinely ignore this real question, instead repeating over and over, like a mantra, "no politics, no politics, no politics." Who knows the truth? And who cares? Let Capizzi be wildly political or as non-political as a cloistered monk, so long as he employs the power of his office in the service of *justice.* Capizzi's defenders, of course, mean to imply that, well, if our boy cares nothing for politics, then he *must* be serving the law.

But that doesn't follow. Even if he *means* to serve the law, he may still fail through incompetence, or short resources, or laziness, or for any number of other reasons. The relevant question is not *why* Capizzi does what he does. It is only *what* is he doing: is he serving the law? Are his prosecutions, for instance, demonstrably selective? Does he overstep proper procedures in harassing citizens in their homes, in interrogating them about their sex lives, in squeezing witnesses in search of testimony damaging to higher ups, a method ill-suited for distinguishing truthful testimony from compelled lying?

Considering, for the moment, only the question of selective prosecution, I recently discovered a new angle that has special significance for Capizzi's felony charges against Maureen Werft. Werft is alleged to have maintained her voter registration in Huntington Beach and to have voted there (by absentee ballot) while she had a temporary political job in Sacramento pending Baugh's election. In late May, I learned that Ms. Mignon Whitaker (wife of long-time Orange County GOP activist Fred Whitaker) and others had followed up news of these charges against Maureen in late March with some old-fashioned gumshoe work. Checking the public voter file, they found more than 100 individuals in Baugh's district — the *same district* Werft voted in — who were apparently registered at business addresses, which would be illegal. Discussing this with staff at the county registrar's office, Mignon says she was told that former Registrar Don Tanney, following standard practice, had informed Capizzi of hundreds (and possibly

CPR *Contributing Editor Leon McKinney writes political commentary for the* Orange County Register.

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thousands) of such violations countywide, but that Capizzi had done nothing. So much for the District Attorney's supposed "single standard."

Of course Capizzi might say he never heard from Tanney, so Whitaker requested copies of the Tanney-Capizzi correspondence. She says she was told it would take several days to fulfill her request because the correspondence amounted to "hundreds" of pages. When Whitaker tried to follow up a few days later, she says registrar staff first avoided her, then told her that their boss, current Registrar Roz Lever, had instructed them not to communicate with Whitaker. Whitaker wrote Lever on April 2 requesting copies of the Tanney-Capizzi correspondence under the federal Freedom of Information Act (FOIA). Lever responded April 9, writing that review of Whitaker's request for "voluminous" amounts of information by "other county agencies having a substantial interest" would take until April 26, adding that Whitaker's request technically fell under California's Public Records Act (CPRA), not FOIA.

On April 25, Deputy County Counsel Kathy Paul denied Whitaker's request, in a letter claiming an exception to the CPRA for law enforcement agencies and their records, including records of complaints to, and investigations by, such agencies, in order to protect investigations from being jeopardized by public disclosure and protecting individual citizens' privacy.

In late May, I learned what had been happening. I contacted the county counsel's office to make the same request Whitaker had made. Deputy County Counsel Ben de Mayo — it seems Deputy Counsel Paul had been transferred to other duties — repeated Paul's excuses for not complying with the CPRA. I replied that the public had a compelling interest in knowing whether the district attorney was ignoring evidence it had been handed on a silver platter of thousands of illegally registered voters. I said it was pretty funny to claim that releasing this evidence would jeopardize investigations since we were talking about evidence indicating that no investigations were occurring, and that that was precisely what the public would want to know, especially alongside the high-profile prosecution of Werft. I said I saw no need to reveal the names of individuals listed by Tanney as possibly registering and/or voting illegally, unless, perhaps, they happened to be government officials. Satisfying the public interest probably required only the release of memoranda from registrar staff to Tanney and Tanney's cover letters to Capizzi. These would indicate the number of individuals involved and would show in black-and-white whether Capizzi had been asked to investigate and prosecute and what, if anything, his response had been. But de Mayo persisted, again claiming a law enforcement exemption from CPRA. I suggested a compromise: the registrar could write me a letter recounting their office's correspondence with Capizzi on this matter. De Mayo responded in a June 24 letter saying: "we cannot release these records to you," and adding that "any further information concerning this process should be sought from" the DA.

The word for this is stonewall, a conclusion confirmed when I learned late last month that while de Mayo was giving me the runaround, the county counsel's office had filed a motion to quash a *subpoena duces tecum* — a pretrial discovery request — by Werft's attorney, Douglas Otto, for the same information I was requesting. In arguing against the registrar's motion to quash his *subpoena,* Otto told the court that the information he sought would prove his contention that Werft was being singled out for "invidious prosecution." He argued that the charges against her "were politically motivated and driven by political animus rather than a search for criminal justice," that Capizzi "has an established *de facto* policy of nonprosecution of ordinary individuals" for voter registration violations (a charge that seemed to be confirmed by what I had been hearing). Otto said that despite Capizzi's published declarations that he treats all reported violations similarly, Werft was being punished selectively for her active role in recalling Doris Allen and for refusing to "roll over" and testify against Baugh.

Werft's attorney contends that the DA's office began manufacturing cases against such convenient ancillary targets as Werft to deflect attention from its primary investigation of Baugh which was failing to uncover anything more substantial than campaign finance reporting violations. These secondary cases, Otto says, were intended to bolster the DA's public relations story that he was stalking a large, corrupt Republican machine, and, in fact, they did provide him a brief series of "guilty" plea headlines in the early going from young Republican activists (all in their 20s). Congressman Dana Rohrabacher says these individuals, threatened with potentially massive, impossible expenses trying to defend themselves, were "intimidated into pleading guilty" even though what they were "trying to do was legal."

Now, in court, Capizzi may be hitting rougher water. Otto and Werft beat the County Counsel's motion to quash their *subpoena.* In early July, presiding Judge Smith ruled in their favor. That means the Registrar will have to release the requested information at least to Werft's attorneys.

Capizzi argues that "a cornerstone of democracy is public confidence in the electoral system. In this regard, a prosecutor's duty is to vigorously enforce the law in general and in particular as it applies to assure honest elections" because "Orange County is not Chicago." It will be interesting to see how well the Tanney-Capizzi correspondence backs him up. CPR

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THE COURT'S WAR ON THE FAMILY

Snatching Defeat From The Jaws of Victory

Mark S. Pulliam

CALIFORNIA'S SUPREME Court may be on the verge of an awesome, unprecedented — and totally unnecessary — assault on parental authority. In a flip-flop reminiscent of a banana republic, on May 22, five members of the Court voted to "rehear" the pro-family decision the Court had just issued six weeks earlier in *American Academy of Pediatrics v. Lungren,* written by Justice Stanley Mosk, the Court's only Demo-

(Please turn to page 12)

Mark S. Pulliam, California Political Review's *legal issues correspondent, is an attorney in private practice in San Diego.*

The View From The Bench

An exclusive interview with The Honorable Ronald M. George

The following interview was originally scheduled and conducted by California Political Review's editor to provide background for a profile article on California's chief justice. In light of criticisms of the state Supreme Court made in Mark Pulliam's nearby piece and in the interest of providing both sides a chance to join the argument, we here publish, in a Q-and-A format, Chief Justice George's own words from the first approximately

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Honorable Ronald M. George is chief justice of the California Supreme Court. This interview was conducted by CPR *Editor John Kurzweil.*

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Pulliam, *from page 11*

crat appointee and usually its most liberal member. (Although these days he has serious competition, from unlikely sources.) As reported in the May/June 1996 *CPR*, the composition of the Court changed after the initial decision was issued on April 4. Because two retiring jurists, Associate Justice Armand Arabian and Chief Justice Malcolm Lucas, voted before they departed with the 4-3 majority upholding California's statute requiring parental consent for a minor to have an abortion, their replacements, Ming Chin and Janice Brown, could provide the votes to overturn this fragile and hard-fought victory. Ominously, both Chin, a moderate, and Brown, reputed to be a conservative, joined with the three dissenters — Justices Ron George, Joyce Kennard, and Kathryn Werdegar — to grant rehearing. Not since the voters removed the notorious Rose Bird and two of her activist cronies from the California Supreme Court in 1986 has a change in Court personnel led to a reversal of recently-issued decisions through the process of rehearing.

Although the granting of rehearing does not necessarily mean that the original decision will be overturned (in 1993 the Court voted to rehear a decision but did not change its ruling), rehearings are rarely granted, and the concurrent change in Court personnel makes reversal seem inevitable. Certainly that is the way the decision to rehear is being perceived by the challengers of the law, represented by the ACLU. "Everyone is very happy," said an ACLU spokesman. "It looks like we may have snatched victory from the jaws of defeat."

Reversal of Justice Mosk's April 4 decision would be disastrous for two distinct reasons. First, it would represent the triumph of an improper, activist jurisprudence using so-called "independent state grounds" — construing the California Constitution more expansively than the U.S. Constitution — to invent non-existent constitutional rights from provisions dealing with "privacy" and "equal protection." When he was Attorney General, George Deukmejian warned that "[t]he growing use of the doctrine of independent state grounds," then being espoused by the liberal Rose Bird Court, "combined with a minimum of judicial restraint, threatens irreparable harm to our system of government. It emasculates the people's right to govern through the legislative process, and substitutes for legislation the judicial decree process." Curiously, however, the judges now advancing this dubious theory are Republican appointees: Chief Justice George and Justices Kennard and Werdegar.

Second, as a matter of public policy, adoption of the dissenters' absolutist insistence that every consideration of law and policy must bow before the banner of "abortion rights" would be devastating. As U.S. Supreme Court Justice Antonin Scalia has pointed out, America is in the grip of a culture war, one in which various minority groups — homosexuals, radical feminists, and militant atheists, for example — seek to undermine the majority's moral values. Conferring on pregnant teenagers a constitutional right to abortion without parental consent represents a further erosion of the family unit and conventional sexual mores.

The Statute

The decision in *American Academy of Pediatrics v. Lungren* concerns a statute, A.B. 2274, passed by a Democrat-controlled Legislature in 1987 and signed into law by Governor George Deukmejian. A.B. 2274 prohibits most minor children from obtaining an abortion without either the consent of a parent or judicial approval. If a minor is unwilling or unable to obtain one of her parent's consent, she can seek judicial approval on an expedited basis from juvenile court with the right to a court-appointed counsel upon request. (Excepted from the statute are "emancipated minors," meaning persons under the age of 18 who are married, enlisted in the armed forces, or financially independent and living away from home with their parents' consent.)

A.B. 2274 is consistent with the U.S. Constitution, as interpreted by the U.S. Supreme

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Court. In fact, in eight separate cases the U.S. Supreme Court has specifically upheld state laws such as A.B. 2274 requiring parental consent for abortions on unmarried, unemancipated minors. The California Legislature carefully followed the guidelines set forth in these decisions and even quoted from the U.S. Supreme Court decisions in the legislative "findings" supporting A.B. 2274.

Thus, A.B. 2274 simply makes abortions subject to the same parental consent requirements for minors that apply to such things as getting married, obtaining a driver's license, using a tanning salon, or receiving most medical and dental treatment. A minor cannot even get a routine x-ray without parental consent. Moreover, A.B. 2274 is consistent with the laws of a majority of states, which require parental notice or consent before an unemancipated minor can terminate her pregnancy by an abortion.

Notwithstanding the concept of states' rights, 'independent state grounds' is usually code for judicial activism.

The Issue

Parents have a compelling interest in fundamental decisions affecting their minor children. The California Supreme Court has long recognized that family privacy and parental authority are protected by the California Constitution. Indeed, in recent decisions the Court ruled that "[p]arenting is a fundamental right," and that a "parent's right to direct his child's upbringing ... [is] among the most basic of civil rights." Moreover, it also ruled that "The liberty interest of a minor is qualitatively different than that of an adult." That minors do not have the same legal status as adults is well-established in caselaw and is, of course, reflected in statutes virtually everywhere throughout California's legal codes. The legal issue presented by *Lungren,* which had never previously been decided by the Court, is whether the right of "privacy," explicitly added to the California Constitution in 1972, confers upon unemancipated minors the right to obtain an abortion without parental consent or judicial authorization. Eight U.S. Supreme Court decisions have said the U.S. Constitution confers no such right. But because the U.S. Constitution does not contain an explicit "privacy" right, California courts have concluded that our state constitution offers greater privacy protection than that afforded by federal law and the eight U.S. Supreme Court decisions directly on point may be ignored.

While it is technically correct that the texts of the U.S. Constitution and the California Constitution are not identical, the federal right of privacy is well-established by judicial decision. The U.S. Supreme Court's controversial 1972 decision in *Roe v. Wade* was based on the "unenumerated" right of privacy. Therefore, the lack of the word "privacy" in the U.S. Constitution is not, by itself, a sufficient basis to ignore otherwise well-reasoned precedents applying federal law. Nor does the presence of the word "privacy" in the California Constitution compel a different result. The ballot arguments in favor of the 1972 "privacy" amendment focused exclusively on "informational privacy": the proliferation of government and business records. Notwithstanding such scant support, in the 1981 *Myers* decision, written by arch-liberal Matthew Tobriner in the heyday of the Rose Bird era, the California Supreme Court interpreted the privacy amendment and the "equal protection" clause of the California Constitution to confer on pregnant women the right to a free, taxpayer-funded abortion, since the government provided medical care to poor women for childbirth. As former Justice Frank Richardson noted in his cogent dissent in *Myers,* "[t]here is nothing whatever in history of the [privacy] initiative to suggest such a bizarre result." In short, just because the California Constitution *can* be interpreted different-

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ly than the U.S. Constitution doesn't mean that it *should* be.

The Original Decision

The decision issued by the California Supreme Court on April 4, 1996 resolved the "conflict" between minors' privacy rights and their parents' right to parental authority and control in favor of *parents*. Mosk's cogent opinion for a four-member majority states at the outset that "[t]his case is not about the morality of abortion." The majority conceded that minors enjoy privacy rights under the California Constitution; however, the rights of minors are not coequal with those of adults: "[T]he privacy interests of an unemancipated minor are qualitatively different from those of an adult and subject both to reasonable regulation by the state to an extent not permissible with adults and to control by the unemancipated minor's parents to an even greater extent." The parents' right to control includes "extensive power to direct the education of a child and to make critical decisions concerning medical treatment." In the most important sentence in the majority opinion, Mosk stated that "[t]he interest of a child in privacy yields to the necessity for parental guidance and oversight."

Accordingly, the majority in *Lungren* declined to recognize a right to "privacy" on behalf of unemancipated pregnant minors that would permit them to obtain abortions without their parents' consent. Therefore, the Court concluded that A.B. 2274 was constitutional, and ordered that the contrary decisions of the trial court and the Court of Appeal be reversed. This is not a remarkable result. Indeed, it would have been remarkable for the Court to have concluded otherwise.

Three justices (all of whom were appointed by Republican governors) disagreed with this result: Kennard, George, and Werdegar. As has become fashionable, each dissenter issued a separate opinion, totalling 44 pages in length. Kennard, who despite being appointed by Governor George Deukmejian is one of the most liberal members of the Court, emphasized that "the great majority of pregnant adolescents who do not voluntarily consult their parents are sufficiently mature to make the abortion decision by themselves and should be permitted to do so in consultation with their physicians and without requiring parental consent or judicial authorization." In her conclusion, Kennard quotes approvingly from arch-liberal Harvard Law professor Larry Tribe (the mastermind of Justice Kennedy's rationale for striking down Colorado's Amendment 2), condemning parental consent requirements as "likely in practice to achieve little and to cause great grief." (That A.B. 2274 would inflict "harm" was established, according to its opponents, by "the testimony of some out-of-state witnesses that adolescents using the [judicial] bypass procedure manifest anxiety and find the experience 'nerve-racking.'" Big deal.) In other words, Kennard would find A.B. 2274 unconstitutional because she doesn't think parental consent is a good idea. Fine. Let her run for office and vote against it in the Legislature, if she can get elected.

George, who was appointed to the Court by Pete Wilson and has succeeded Malcolm Lucas as chief justice, took a different tack. In addition to disagreeing with the majority on the "privacy" issue, George asserted an "equal protection" objection based on the 1981 *Myers* decision. George would extend the shoddy reasoning of *Myers* to the parental consent situation. In his view, because A.B. 2274 only requires parental consent for a minor to *terminate* a pregnancy by abortion, and not for prenatal care and childbirth, the Legislature violated the constitutional requirement of equal protection — evenhanded treatment. Mosk, who joined in the *Myers* decision 15 years ago, rejected this analogy in his majority opinion: *Myers* did not involve unemancipated minors, and besides, "an unemancipated minor seeking an abortion and an unemancipated minor carrying a pregnancy to term are not similarly situated." Werdegar, a moderate Wilson appointee who generally votes with

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George, wrote a separate dissenting opinion echoing the arguments of Kennard and George.

What Is At Stake?

Lawyers can argue endlessly over minutiae such as the application of this "balancing test" or that legal standard, this presumption or that burden of proof, this aspect of the trial court record or that study from another state. But the Court's decision to rehear *Lungren* raises two overriding concerns, one jurisprudential (the use of "independent state grounds" to expand minors' "right of privacy") and one of public policy (a diminution of parental control that will further erode the institution of the family).

Notwithstanding the concept of states' rights, "independent state grounds" is usually code for judicial activism. Judicial and academic interest in "independent state grounds" for state court decision-making blossomed, unsurprisingly, in the 1970s, just when the U.S. Supreme Court under Chief Justices Warren Burger and William Rehnquist started cutting back on decades of activist decisions by the Warren Court. Former U.S. Supreme Court Justice William Brennan, architect of many liberal constitutional law decisions of the last 40 years, aggressively advocated "independent state grounds" as a basis for activist decision-making by state courts. In fact, Brennan penned a Foreword espousing this theme to former California Supreme Court Justice Joseph Grodin's judicial memoir, *In Pursuit of Justice* (1989). In California, the Bird Court relied heavily on "independent state grounds" to invalidate death penalty verdicts an to re-write or throw out many laws its liberal ideologue members disliked. In response to activist interpretations of the California Constitution by the Bird Court (and that of her predecessor, Chief Justice Donald Wright), voters were repeatedly forced to amend the Constitution through the initiative process, on such issues as the death penalty, busing, and the exclusionary rule. Thus, in the past, California voters have had to *force* the California Supreme Court to follow federal precedents in order to restrain its activism. Now Ron George seems set on returning the Court to its old tricks, this time creating radical new rights of minors to be free of parental control.

Courts that inject themselves into political policy-making invite, indeed demand, judgment by the people regarding the quality of the policies they impose on us. So it is also relevant and necessary to point out that imposing this radical vision would constitute a judicial assault on the family, an institution despised by feminists and proponents of the welfare state precisely because it embodies and symbolizes traditional values. As Edward J. Erler, professor of political science at California State University, San Bernardino, points out regarding *Lungren:*

> ... [A]s almost everyone seems to know, the argument here is not about the privacy rights of "immature minors." It is about the integrity of the family. Those who advocate privacy rights for minor children seek to dissolve or weaken the family. In particular, opponents of the parental consent law relied not on legal reasoning, but on ideological presuppositions about the proper role of family life. This ideological predilection considers the family unit as an archaic institution because it is based on a kind of outmoded patriarchy that views female partners and children as chattels.

We are seeing an unprecedented moral crisis. Teenage pregnancy and illegitimate birth rates are skyrocketing. Everyone except the liberal elites seem to acknowledge that much of this crisis is attributable to the erosion of "family values" since the advent of the Great Society. Allan Carlson, president of the Rockford Institute, points out in his 1988 study, *Family Questions,* that for nearly 1500 years, regulation of adolescent sexual activity was accomplished by the application of an ascetic moral code that emphasized abstinence, marriage, and Judeo-Christian sexual mores. This moral code was inculcated primarily through the family, by parents raising their children. The explosion of teenage pregnancy and the out-of-wedlock birthrate coincides with the substitution for parental control of a new social model, one the California Supreme Court may soon begin imposing on the

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state. Carlson observes that "[i]n this new scheme, children are cast as wholly independent moral actors," and "adolescents have a 'right of privacy' which overrides parental control." Once the traditional family is weakened and parents are deprived of authority to raise their children, Carlson concludes, "*only* the welfare state — in the guise of state-funded family planning clinics — remains to fulfill the role, albeit through radically different means." Stripped to its essence, the dissenters in *Lungren* challenge the right of parents to act like parents.

This is illegitimate judicial activism regardless of whether one is "prolife" or "pro-choice." Moreover, because the reasoning of the dissenters is totally unprincipled, it is also unpredictable in its application and limits. Does a child's right to privacy include the right to have tattoos without parental consent? To donate organs? To have plastic surgery? To get married? To drop out of high school? To join the military? To have a separate bedroom? To "divorce" one's biological parents? To watch x-rated movies? To stay out all night? To vote? How are these "rights"— which are enjoyed by adults but denied to children — distinguishable from the right to have an abortion? If the Supreme Court overturns A.B. 2274, what is next? Curfew laws? Truancy laws? Compulsory schooling? Statutory rape? Which of the countless legal burdens faced by minors are *not* vulnerable to the ersatz judicial nit-picking engaged in by the dissenting justices? The dissenting opinions in *Lungren* represent a wrecking ball aimed at usurping the authority of the Legislature and demolishing the foundations of the family. In response to the Court's decision to grant rehearing on May 22, former California Supreme Court Justice William Clark, a Reagan appointee who served with distinction, lamented that "[m]y old court is simply wrong today. The courts are clearly substituting their own moral judgment for that of the people ...."

So entrenched has become the activist judicial philosophy taught in the law schools and applauded by liberal commentators in the universities and the media that unthinking justices may find themselves accepting it uncritically. It is possible Ron George and his allies are really liberals. More likely, however, but more disturbingly, they may simply be sleepwalking in a sense, adopting without rigorous analysis their law clerks' politically correct recommendations. If so, they should wake up. Much is a stake.

The dissenting opinions represent a wrecking ball usurping the authority of the Legislature and demolishing the foundations of the family.

George Deukmejian presciently observed in 1979 that the Court's use of "independent state grounds" to overturn democratically-enacted laws "lowers confidence in our representative form of government."

> A judiciary [Deukmejian continued] which intentionally undertakes the task of making legislative decisions will, by necessity, become enmeshed in the political process.... Such a judiciary ceases to be perceived as a bastion of rights and justice, and when courts are perceived as anything else, the entire fabric of our judicial system begins to unravel.

The justices will argue that "the Constitution made us do it." Berkeley Law Professor Phillip Johnson calls this a "specious claim." In the area of "independent state grounds," justices exercise extremely broad discretion in deciding which federal precedents to follow and which to ignore. Therefore, Johnson concludes, "[t]he Court's policy choices may or may not be defensible, but they are certainly freely willed.... The constitution requires [a particular result] only if the Court wants the constitution to require it."

A final word: Five of the Court's seven justices will be on the ballot in 1998. Paraphrasing Santayana: those who fail to learn from history are doomed to repeat it. CPR

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George, from page 11

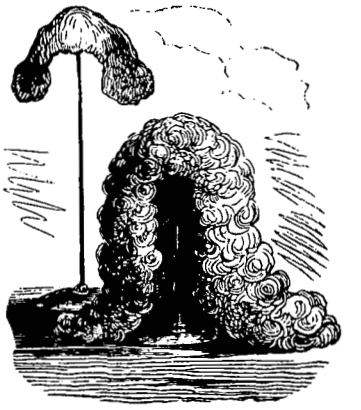
two-thirds of the interview, a section that deals directly with several points Mr. Pulliam raises. Some questions and answers have been condensed to aid readability, but not in any way that alters meaning or eliminates any point raised. Nothing has been added; Chief Justice George said every word attributed to him. Bracketed words are added for clarity.

CPR: *CPR's* Legal Issues correspondent, Mark Pulliam, notes that the percentage of "no" votes in judicial retention elections has increased sharply in recent years, in all parts of the state. In 1994, 23 of the 45 justices on the ballot received negative votes exceeding 40 percent, without an opponent and without a negative campaign. Additionally, in your May 15 State of the Judiciary Address, you said that the public's "confidence can be maintained only if the public believes in the neutrality of judges." Is the public, nearly a decade after rejecting Rose Bird and two other sitting justices, losing faith in that neutrality?

Justice George: I am not convinced that they are. I think various factors come into being with regard to the votes that were rendered in that election. And the most important factor — there is documentation to prove this beyond any doubt — is that that was the first election where, due to a change in the elections code, the words "for the term prescribed by law" were replaced [on voters' ballots] by the numerical figure: four years or eight years in the case of someone serving out the balance of a predecessor's term, or 12 years if somebody was up for a full term. There was a direct correlation. Those who had the number 12 years after their names received several percentage points less. It has been estimated perhaps as much as 10 percent less by reason of that factor. *That,* to me, was the most significant aspect. There's a study that charts those that have four years, those that have eight years, those that have 12 years, and establishes beyond any possibility of coincidence that that was a major factor whether the justice happened to be liberal or conservative.

CPR: Why would it be a factor?

Justice George: Because of the whole feeling about term limits. I think seeing 12 years after somebody's name was enough in its own right to make citizens who perhaps are not as attuned to the differences between the political and the judicial branch feel, well, 12 years is too long for anyone to be up there.



CPR: But isn't there more to it than that? As you say, public "confidence can be maintained only if the public believes in the neutrality of judges." And there is this history of judicial activism: In 1986, when Rose Bird was chief justice, Boalt Hall Law Professor Phillip E. Johnson wrote that his reason for criticizing the Court was that, "Over the years I have become convinced that the decisions of the Court have been increasingly politicized and result-oriented." And Mickey Kaus, former Justice Otto Kaus's son, wrote at the time: "... liberals ... have long championed the role of judges as bold social reformers. One California justice, the late Matthew Tobriner, used to give speeches on the Court's obligation to react to 'the economic imbalance in our society' and 'the plight of the economically downtrodden.'" Isn't it possible the people are losing some confidence in the judiciary because they think activism or lack of neutrality is reasserting itself?

Justice George: I don't think that's the case because you have the same factor of lower vote with regard to persons whom one might argue are considered more activist and those considered least activist. A lot of it has to do with the person's name; the 12-year figure is very important as I say. So I think that's lending a level of sophistication to the electoral decision of individual voters that I don't think is warranted from what I've heard. There are people who don't understand and blame the state courts for things that have happened exclusively in the federal courts. There is an *incredible* lack of information about the whole judicial process, even about the whole concept of separation of powers and the limited nature of the judicial role. Very frankly, what's most discouraging to me is not the particular figures but that there is so little awareness. I somewhat fault the press in that.

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They don't do a better job in explaining to the voters what the process is about and to taking positions on endorsements, positive or negative, in judicial races. We see some of the major newspapers in the state endorsing down to the level of dogcatcher and yet when Supreme Court justices and Court of Appeal justices were up, they were left more or less to twist in the wind. And I've told some people on editorial boards — because part of my outreach program as chief justice is to meet with all sorts of groups, not particularly on this issue but sometimes the election issue comes up — and I said I'd rather see you take a vote and perhaps endorse against somebody's re-election if there's a bad apple in the bunch rather than just not take a position on anybody.

CPR: Are you saying there *isn't* a judicial overreaching problem or lack of neutrality? I ask because in preparing for this interview I have heard specific complaints raised. I want to mention them to you so that we will give both sides.
Justice George: Sure. I think at the federal courts there very frankly is a lot more of a basis for people to think that there is an "activism."

CPR: I have two examples — from federal and state courts — that observers cite indicating that the courts are improperly taking sides in what is called the cultural war. One, in the federal *Romer* case on Colorado's Amendment Two, Justice Antonin Scalia's dissent says quite straightforwardly "this court has no business imposing upon all Americans a resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality ... is evil."

Secondly, former California Supreme Court Justice William Clark remarked on the recent decision to rehear *American Academy of Pediatrics v. Lungren:* "The courts are clearly substituting their own moral judgment for that of the people when abortion is involved."

And, to add a point of my own regarding having a vote to rehear a case almost instantly after court personnel changes: suppose a baseball game changed umpires in the fifth inning and the new umpires suddenly started re-appraising the calls from the first half of the game, what would you think?
Justice George: First of all, I will tell you what I won't feel comfortable responding to. That is, I wouldn't comment on the U.S. Supreme Court case and I can't comment on the *American Pediatrics* case because that is before us, obviously, upon a grant of rehearing and the canons of ethics prohibit any judge from discussing that. But I think that if one reads through the various opinions there, you see that there are some precedents that various people on both sides of the former opinion relied upon. So, to that extent, when there is an attempt to invoke precedent, perhaps reasonable minds may differ in terms of what is the controlling precedent but it is still a conservative or restrained process when you are trying to follow precedent around than trying to overturn it and create new directions by way of social policy.

With regard to the more fundamental question which you posed at the end, there is a very clear history and precedent, if you will, for the Court reconsidering cases in light of the current personnel. There were a number of decisions with which you probably would not quarrel [in which] the Court, immediately after the 1986 retention election, granted rehearing. [The original decisions] were decided by the Rose Bird Court and [on rehearing, the Court] in fact reversed the decision of the Bird Court on various death penalty matters including particularly that *Carlos* line of cases on specific intent and other matters.

CPR: I have heard that precedent mentioned but, frankly, I have heard no others. It was a pretty extraordinary circumstance with Bird: no justice from the Supreme Court, up to that point, or from the appellate level in California, had ever before been turned out by the voters. It was an overwhelming statement by the public about certain justices. Are there any, or many, other circumstances where the change in personnel results in this kind of thing?
Justice George: No, there have been other instances when people came on the Court, they were entitled to — you see, you have to remember one thing: it's somewhat different from saying, after the case is final, [after] three months,

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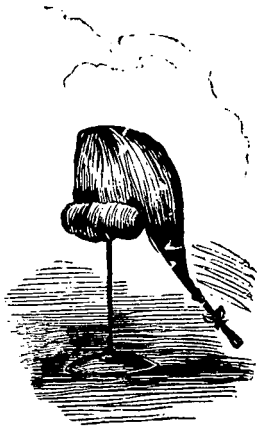
let's revisit this in a new case. But the case, by definition, is *not* final for 30 days after it's rendered. I think that, whichever direction one is talking about, there is a certain benefit to the institutional process and to the public in knowing that whatever decision comes down reflects the current — and for the foreseeable future — the existing composition of the Court rather than having, in effect, the dead hand of the departed indicate what the law was with the circumstance inevitably following that people will question: well, is this really valid authority? There are only two members of the court that rendered the four-person majority still present. Isn't the court going to question this; is it really going to follow it?

Now, the Court can grant rehearing, and some would have the view, even if they come out with the same result, it's important for the current composition of the Court — and I am talking now in the abstract, attempting not to speak about specific cases — isn't it important for a Court to have it understood that it is the current court that is expressing its views? And, again, I stress that we are just talking about that 30-day period, because the case isn't final anyway; it's not binding until 30 days afterwards. I think it's a very different situation from what you pose.

CPR: For another example, people perceive the Court treating the rights of litigating parties differently depending on the political objectives involved; that sometimes when a left political objective is invoked, the right in question will be given a sort of absolutist status. Rights championed by conservatives, in contrast, carry little weight. For instance, in *Smith v. Fair Employment & Housing Commission* [12 Cal. 4th 1143, involving a landlord who refused to rent an apartment to an unmarried couple on the basis of her religious beliefs and in which the Court ruled the landlord discriminated unlawfully], at one point the majority opinion reads: "one observes the obvious conflict between FEHA and the landlord's religious beliefs .... one who earns a living though the return on capital invested in rental properties can, if she does not wish to comply with an antidiscrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments."



Contrast that with a statement later in the decision: "To say that the prospective tenants may rent elsewhere is to deny them the full choice of available housing accommodations enjoyed by others in the rental market. To say they may rent elsewhere is also to deny them the right to be treated equally by commercial enterprises; this dignity interest is impaired by even one landlord's refusal to rent, whether or not the prospective tenants eventually find housing elsewhere." It strikes me, and I think a lot of people, as not equitable. What do you think?

Justice George: I'm sorry to appear reluctant, but I've always held the position [that it's not] appropriate for me to get in and debate the merits of a particular decision or a passage in a decision.

CPR: I raise the example primarily to make clear what kind of thing I am talking about. But may I take it as a general statement of your perception: you don't think that these political considerations color some of these opinions?

Justice George: No, I really don't think so. And we have some things that reflect a unanimous view of the Court along a broad range of justices on the Court. And, again, I'm not going to discuss it, but look at this 3-Strikes opinion that came down. It relied on past precedent and was very much founded upon a decision of this Court that we found binding there. You had everybody from Stanley Mosk to Marvin Baxter joining in, the whole spectrum. I know for a fact that there are situations, and I'm not talking about the Three Strikes [decision], where justices have voted contrary to the way they voted on the ballot [on] whether an initiative measure would or would not be upheld. So I think there is a conscientious effort made to separate one's own personal, political, social, economic views from the way one rules and *not* be result-oriented but very much oriented toward the process. And I think that's something the lay persons don't quite understand. And there, again, I fault the press a bit because often these decisions

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are viewed more or less as a Roman circus — thumbs up, thumbs down, who won, who lost — and *not:* what was the reason that led the judge to reach this conclusion. [It is not that] they wanted the cop to win or the criminal to win; it's: did they follow precedent, why did they get to this particular end result?

CPR: Can you say, as explanation, what exactly the court found wrong in the 3-Strikes case?
Justice George: Again, I do not want to be quoted at all commenting on a case that isn't final. [The Court found] that the Court [must] adhere to its own precedent in finding that there was a separation of powers problem. I think the Court has been very diligent in not wanting to intrude on the function of the other two branches and by the same token not having the other two branches intrude on its function. There was a precedent, the *Tenorio* case, that very clearly held that the exercise of judicial discretion on something that is inherent in the judicial process, such as sentencing, is a violation of separation of powers, giving the prosecutor a veto over a judge's discretion with regard to certain aspects of sentencing. And that is basically a conservative approach, adhering not only to precedent but particularly to separation of powers. And you had the most conservative and most liberal members of the court unified in this. It had nothing to do with whether they liked 3-Strikes or didn't like 3-Strikes. I think a couple of days after the decision came down, when people actually had a chance to read what they were talking rather glibly about in the press, a lot of the people who had made rather extreme statements were making very different types of statements like: Okay, we can see this is a problem that the court identified, whether we agree with it or not. But this is how we can fix it legislatively.

Let me just say this: there are decisions you can pick out that I would agree wholeheartedly with you; I just don't think it is appropriate for me as a judge to start criticizing my federal brethren or some predecessors from an earlier era. The point I would make is that, maybe simplistically, sometimes people don't like some of the results from the Court's decision and just assume that: Oh, well, this is another instance of somebody imposing their own view. All the indications I have, and I'm privy, obviously, to the discussions that go on in deciding a case, [indicate that] it's really not the situation.

CPR: Well, sure, a lot of people do react that way. But that, in and of itself, doesn't necessarily prove that there isn't politicking going on at times. As a final question in this regard, you mention in your *American Pediatrics* dissent another case from much earlier [1981]: *Committee to Defend Reproductive Rights v. Myers.* [29 Cal.3rd 252] Near the conclusion of [Justice Frank] Richardson's dissent [in *Myers],* he says: "Certainly, the people did not intend to extend 'privacy' to encompass a *constitutional* access to the public treasury for all indigents who want free abortions. Such a speculative jump in reasoning is of Olympian proportions — from a restriction on information distribution to a constitutional obligation to pay for abortions. With due deference, I suggest that such a consequence is the pure invention of the majority and not constitutionally ordained by any California 'right of privacy,'" This is not somebody who doesn't understand the law, or who has some narrow political agenda. This is a justice of the Supreme Court saying this. If *he* thinks that way, at least about that particular case, don't the people, in some sense, have a reason to think that judges at least sometimes aren't neutral?
Justice George: But see, this is the point: One can argue that one should reconsider *Myers.* But until, and unless, we do, *Myers* is binding precedent. Conservative *juris prudence* dictates that we follow precedent. We can't apply it when we want or willy-nilly apply it.

One can make an argument — and I am proposing this hypothetically because I cannot say anything about the *American Pediatrics* case, as I said — that *Myers,* perhaps, was wrong. Well, if it was, then the Court has to overrule it, and when there are enough votes to overrule *Myers,* maybe it'll get overruled. But until that day, *Myers* is binding precedent. So, Justice Richardson's arguments are powerful arguments in favor of reconsidering *Myers* and deciding *Myers* differently if reconsideration is granted. But unless and until that happens, *Myers* is the law. CPR

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The California Dream

by Terry Eastland

IN OCTOBER 1995, sponsors of the California Civil Rights Initiative (CCRI) began collecting the signatures needed — almost 700,000 — in order to have the measure placed on the November 1996 ballot. An effort to recover the original intent of the Civil Rights Act of 1964, after which it is named, the initiative would amend the state constitution on these terms: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CCRI thus takes aim at all forms of discrimination, including that which results from preferential treatment. It would not outlaw nondiscriminatory affirmative ac- tion programs, such as those used in recruitment and training. By prohibiting discrimination based on sex as well as race, CCRI recognizes that there is no separate case to be made for preferential treatment based on gender. In California as elsewhere, affirmative action for women shares many of the same rationales as affirmative action for blacks and other minorities, and employs the same preferential techniques — "goals and timetables," "bid preferences," and so on.

Long the state most symbolic of New World opportunity, California during the affirmative action era has continued to grow in terms of both population and racial and ethnic diversity as state officials have pursued perhaps the most aggressive preference policies found anywhere in the country. The population climbed from 19 million in 1970 to 31 million in 1995, exceeding Canada's. Californians can trace their roots back to 150 different countries. Non-Hispanic whites constitute 57 percent of the population, Latinos 26 percent, Asians and Pacific Islanders 9 percent, and blacks 7 percent. Twenty-five percent of the population — the largest proportion of any state in the nation — is foreign-born. California promises to become more racially and ethnically jumbled in the years to come, not only as a result of immigration but also because of intermarriage, since a third to a half of Latinos and Asians in California now marry outside their ethnic group. Those eligible for most of the state's many affirmative action programs encompass all but the non-Hispanic white males, leaving 73 percent of all Californians who may be said to have a self-interest, narrowly understood, in maintaining affirmative action. But polls surveying opinion in the state have consistently found two-thirds favoring CCRI, with no difference between men and women, and with 40 to 50 percent of blacks and Latinos backing the measure.

THE STATE code alone suggests the far-ranging nature of California's pursuit of affirmative action. For example, all state departments and agencies must establish in their personnel policies "goals and timetables designed to overcome any identified underutilization of minorities and women in their respective organizations." "Underutilization" is defined as merely having "fewer persons of a particular group in an occupation or at a level in a department that would reasonably be expected by their

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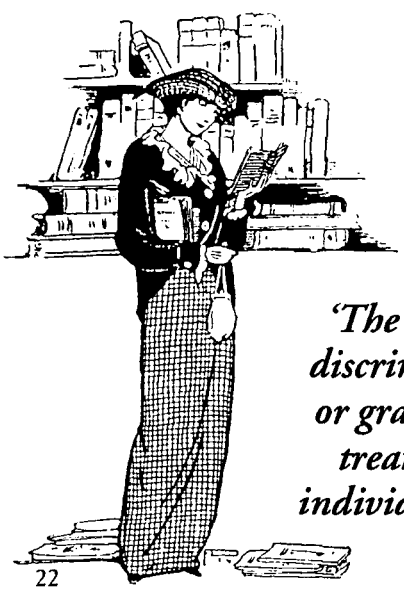
availability" — a definition similar to that found in the federal government's regulations implementing Executive Order 11246, which imposes numerical affirmative action upon federal contractors.

Another example: the governing board of each community college district must establish goals and timetables for hiring and promoting for administrative, faculty, and other positions "persons who are underrepresented in the work force compared to their number in the population, including ... women and persons of racial and ethnic backgrounds."

Pursuit of a goal can entail passing over qualified candidates in favor of less qualified persons "who may become qualified through appropriate training or experience within a reasonable length of time." Districts achieving their goals receive payments from a state "diversity fund." The money is a reimbursement for the administrative costs of affirmative action but also a bonus of sorts that may be pocketed. Thus it pays to discriminate.

STATE LAW also ensures preferences in procurement. The state treasurer must award at least 15 percent of the annual value of professional services contracts involved in the sale of California bonds to minority-owned firms and at least 5 percent to those owned by women. The law defines "minority" as "an ethnic person of color including American Indians, Asians (including, but not limited to, Chinese, Japanese, Koreans, Pacific Islanders, Samoans, and Southeast Asians), Blacks, Filipinos, and Hispanics." The director of the California lottery also has a set-aside duty: the director must demand of those bidding for contracts (on jobs related to the administration of the lottery) that they subcontract a portion of the work to "socially and economically disadvantaged" enterprises, defined as minorities and women. Like most set-asides, this one was adopted in order to secure "the advancement of business opportunities" for those it makes eligible — in theory the overwhelming majority of the state's population. And then there is the set-aside labor of the general services department, which is forbidden by law from awarding contracts for commodities, services, and construction to the lowest bidder, unless that bidder promises to subcontract work to minorities and women.



'The state shall not discriminate against, or grant preferential treatment to, any individual or group...'

The California Civil Rights Initiative is the creation of two professors new to grassroots political activism — Tom Wood, executive director of the California Association of Scholars and a former philosophy professor, and Glynn Custred, a professor of anthropology at California State University, Hayward. "Since we both worked in higher education," says Wood, "we had seen how aggressive and how pernicious affirmative action in California had become." In 1991, they saw how much more aggressive and more pernicious it might become when the Democratically controlled Legislature passed a bill that, but for a veto by Governor Pete Wilson, would have pressured the university system to use preferences to achieve racial and ethnic proportionalism in admissions and even graduation.

Assembly Bill No. 2150 was a bold proposal indeed. In the euphemistic clothing of "educational equity," the bill represented affirmative action in its fullest, most grotesque evolution into a policy whose dedication to a mindless proportionalism would have undermined academic merit while guaranteeing racial and ethnic discrimination.

In 1973, a joint committee of the Legislature had recommended that the state's higher education system approximate the general ethnic composition of its high school graduates. In 1984, the Legislature passed a resolution calling for the achievement of "full educational equity," now defined as proportionalism in terms of admissions and graduation rates. In 1989, another joint committee of the Legislature beat the drum for "educational equity," recommending that "each segment of California public higher education shall strive to approximate by the year 2000" the ethnic composition of recent high school graduates. Throughout the two decades, of course, the institutions that make up the system (with the exception of the community colleges, which have open admissions) had zealously pursued affirmative action, admitting students on the basis of race and ethnicity. In the name of "educational equity," Assembly Bill No. 2150 would have put the state formally in favor of the exacting proportionalism that previous legislatures had merely encouraged through reports and other means.

The bill declared that "individuals from historically and currently under-represented groups who seek to enter higher education continue to labor under a disadvantage with individuals from other groups because of disparities in high school preparation and college and university admission, transfer, retention, and graduation rates." As proof of this, the bill adduced an assort-

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ment of statistical disparities — in the levels of under-represented students eligible for and enrolling in college; of those "transferring from community colleges to four-year colleges and universities"; and of those "completing degrees in community colleges and four-year colleges and universities." Notwithstanding the inherent weakness of this kind of evidence, the bill committed the state to remedying the disparities. The bill defined "educational equity" as occurring when "the composition of all individuals at all educational levels, from elementary school student bodies through college and university student bodies, as well as elementary school faculty and administrative ranks through college and university faculty and administrative ranks, encompasses the diversity of the state" — an ambitious, even otherworldly goal.

Consistent with this definition of educational equity, the bill declared the state's intent that "each segment" of higher educational "shall strive to approximate, by 2000, a diverse student body which mirrors the composition of recent high school graduates, both in first-year classes and subsequent college and university graduating classes, for individuals from historically and currently under-represented" groups.

CONTRARY TO the premises of those backing the bill, the reality of daily life is that racial and ethnic groups do not achieve equal outcomes, in education or elsewhere, for reasons that cannot be reduced merely to discrimination. All groups are under-represented in some ways and over-represented in others; Asians, for example, make up 2.9 percent of the workforce but are "under-represented" in football and basketball and "over-represented" in other endeavors, constituting 11 percent of the nation's physicians, 7.2 percent of our college professors, 6.7 percent of our natural scientists, and 6 percent of our mathematical and computer scientists. Despite such facts, the authors of the legislation were dead serious about achieving its goal in the year 2000, and about doing so through means other than the development of policies that might enhance educational performance in the lower levels of the state's public educational system. The bill imposed on the governing boards of the University of California system the responsibility of ensuring that each school pursued proportionalism, providing that the performance of school administrators would be evaluated in terms of how they executed their "diversity and educational equity" responsibilities. The bill obscured its implications by never mentioning the term "preferences," or even "affirmative action," and of course steered entirely clear of the word "quota."

YET AS Custred said, "If we define a quota as a specific numerical proportion ... designed to attain a specific outcome ... which must be reached by a given date, with consequences for those in authority if the goal is not reached, then we have in [this bill] a graduation quota based on race and ethnicity and mandated by statute." Such a quota might well have required double (or more) standards for academic assessment, and doubtless would have led to discrimination against persons said to be "over-represented" in the university system — Asians, more than any other group.

Having seen in Assembly Bill 2150 an even more ghastly future for California higher education, Wood and Custred worried that a similar bill would become law under a different governor. That No. 2150 had passed without debate in the Legislature, with hardly any notice in the California press, only intensified their concern. And then they discovered, as Wood puts it, that "the problem was metastasizing everywhere" — in public employment and contracting, especially, from the state level on down.

By 1992, Wood and Custred had grown more certain that the only way to address the problem was through a state constitutional amendment, which voters ultimately must approve. They had hoped to get an amendment on the November 1994 ballot, but time and political circumstance worked against them. Under the California Constitution, two-thirds of both houses of the Legislature may propose an amendment, and in August 1994, Republican lawmakers in the state Assembly pushed an early version of CCRI. But with Democrats in control of both houses of the Legislature, and the proposed amendment drawing vigorous opposition from state civil rights leaders and the public employee unions, the measure died after a three-hour hearing. Fortunately, the state constitution also provides a process by which the people themselves may propose an amendment by referendum — the strategy Wood and Custred finally decided to pursue. "The only way," says Custred, "was to take it to the people."

(This excerpt from Ending Affirmative Action *will conclude in CPR's September/October issue.)*

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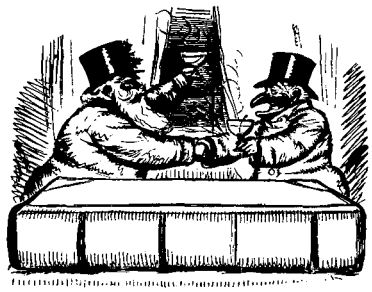

CRITICUS

What Can I Say?

BY G. B. TENNYSON

BY NOW everyone is so aware of the tyranny of political correctness as it dictates what may and may not be said and written publicly that the whole concept has become something of a joke. (And don't forget who alerted you way back to all this codswallop — see "Criticus," *CPR,* fall 1990 and winter 1991.) The scorn became so great that even liberals tried to deflect it. The earnest academic ones argued for some time that the very concept didn't even exist but was created by disgruntled conservatives to embarrass liberals. That drew a laugh and a yawn. The savvier entertainment types simply co-opted the term, so we have a television program called "Politically Incorrect," which is in fact politically correct. It has helped create in its host a new comic star, the smirking Bill Maher, whose idea of political daring is to invite ex-Governor Moonbeam to cross verbal swords with the usual Hollywood and media suspects. Meantime the American rights to make a film and/or new television series of the British comedy series "Absolutely Fabulous" (see "Obiter Dicta," Criticus, *CPR,* Autumn 1994) were bought by Roseanne and are now languishing and withering unto death precisely because the whole concept is so politically incorrect that it is impossible to clean up. What can one do with a pair of forty-somethings whose philosophy of life can be summed up in Critical dog-Latin as *bibo et fumo ergo sum?*

Setbacks notwithstanding, political correctness continues to shape public discourse. All societies exert some degree of thought and speech control, both of the *lèse Majesté* or anti-sedition sort and of the sexual morality sort. What is so ignoble about the P.C. type of control (which is essentially of the *lèse Majesté* variety, *Majesté* here being Liberal Think) is that it comes from those who most decry censorship and most extol freedom of thought and expression, from those who are First Amendment Absolutists. We still hear from these free speechers of the terrible damage done by Victorian prudery, to say nothing of the harm that same prudery wrought on the natural physical impulses of the young and restless. In those dark days one could scarcely refer to any body part below the neck, except when absolutely necessary and then only with such vague terms as "limb." Today one can scarcely refer to any body part above the neck at all unless it be likened to some lower part, of which one can speak with something approaching abandon. A few restrictions remain, but they are fundamentally political, not matters of decency.

Therein lies the distinction. Therein we see why political correctness, for all its similarity to Victorian prudery, has another, more sinister dimension. Victorian and virtually all other societies had/have various kinds of taboos on matters once considered intimate and personal, as in the now laughable expression "private parts," which Howard Stern oxymoronically used as the title of his autobiography. To show what little remains of taboos on public discussion of such intimate and personal matters, Constant Readers will be

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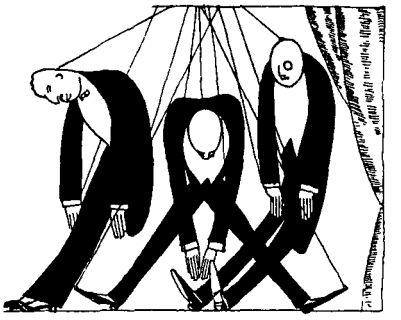
enlightened to learn that we recently had the merriment of a series of exchanges in that flagship of correctness and diversity, the UCLA *Daily Bruin,* concerning the subject of the Asian *membrum virile,* though, of course, less delicate vocabulary was employed in the *Bruin.* The issue was raised by letters to the editor from Asian female students who considered the topic from sexual, racial, politically correct and other angles. All this in turn aroused an Asian male to write, amidst much self-inspection, that he wondered whether he, like many other Asian-American males, might really be a banana. This last was apparently inadvertent humor in that it turns out that a "banana" in this sense concerns only the Asian psyche: the Asian equivalent of the black taunt "oreo," *i.e.* black on the outside, white on the inside, and thus no credit to one's people. A "banana" of course is yellow on the outside, white on the inside, hence also discreditable. All this is only to report on the more paraphrasable portions of the disquisitions that graced the student newspaper of the largest university in the state. Parents, it's high noon, do you know what your college children are reading? Not to worry, they never once used the offensive word "oriental."

But if verbal delicacy marks the contemporary collegian, their elders and inferiors still have much to learn. The obituaries of the late Jimmy the Greek all remembered him chiefly for losing his television job for having said that in plantation days blacks were bred for physical strength. Why this undisputed fact was offensive is still not clear but probably because it reminded us without hand-wringing that such a thing as slavery existed. And then there is the case of the blundering Marge Schott. She said of Hitler what G.B. Shaw and many other leading intellectuals of the thirties said except that she, not they, added that later he went nuts. Shaw and all simply dropped Hitler when the bombs started falling and went on to praise other famous men such as Stalin. Schott didn't even say, as did the Prime Minister of Great Britain at Munich, that with Hitler we had achieved "peace with honour ... peace for our time." Two years later he changed his mind enough to say that Hitler had "missed the bus" when in fact Hitler was driving it. But that was then and this is now, so it's Marge who has missed the bus. Besides, she sent used flowers and has been seen smoking in public. Off with her head.



Curiously the only prominent voice Criticus heard raised in defense of the Curse of Cincinnati was Jesse Jackson's. Possibly he still remembers his 'Hymietown' remark.

Curiously the only prominent voice Criticus heard raised in defense of the Curse of Cincinnati was Jesse Jackson's. Possibly he still remembers his "Hymietown" remark, though the media have politely forgotten it, as they have Mike Wallace's tasteless remarks about eating watermelon. Jackson has not, however, so far protested St. Martin's Press' sudden cancellation, even after printing was underway, of David Irving's biography of Joseph Goebbels, which has been published in England and generally received as an informative treatment of a master propagandist. The book's sin appears to be that it was written by Irving, a known apologist for the Third Reich, and that, as in previous writings, he continues to deny that Hitler ever ordered the Holocaust. Reason enough to keep such a work from the tender eyes of American readers, just as its negative portrayal of some "daughters of Eve" some years ago kept the late Kingsley Amis's novel *Stanley and the Women* from being printed in America.

Now, lest there be any misunderstanding, let it be said that Criticus himself is not here denying the Holocaust. Got that? But one can muse on why it is necessary to prevent any critical examination of the official history of that awful event. In Germany it is a crime not only to question publicly that the Holocaust occurred but even to question the number of victims. In France it is illegal to question any "crimes against humanity," an edict so sweeping one wonders whether it requires a government master list of such crimes and whether such a list is available for consultation and regularly updated. An early victim of that absurdity a few years back was the brilliant (and leftist, let it be said) film director Claude Autant-Lara, now dead but unforgotten by Criticus at least as the creator of one of the most tender and touching films of all time about adolescent love, *Le blé en herbe.* (Despair, Constant Read-

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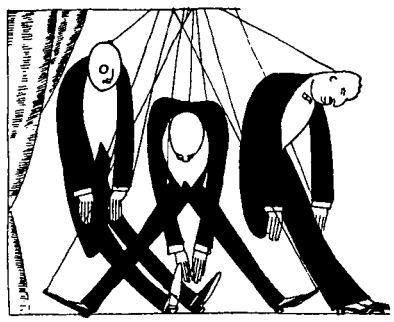
ers, you won't find it in your video rental shop, but you can read the novel by Colette on which it was based.) More recently, indeed this year, there was the 83-year-old (also left-wing, please note) Abbé Pierre, a somewhat dopey champion of the homeless, who fled France and is in hiding in Italy or Switzerland as a consequence of the outcry over his having expressed support for a book by the ex-communist, ex-Catholic, now Muslim, Roger Garaudy in which Garaudy questions the Holocaust.



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One can imagine the conversation among the French chattering classes. "Did you see," says Jean-Pierre, "that they have added the Serbs to the list?" *"Mais oui,"* replies Marie-Claire, "one cannot doubt their viciousness; and the talk is that next week they'll add the Croats, the Brutal Hun, and the Unspeakable Turk. They've already included Columbus and his crew for spreading disease in the Americas." *"Zut alors,"* cries Francois, "I thought the problem was that they *brought back* syphilis, previously unknown in Europe." "That too," interjects Mireille, "but that's their crime as well, isn't it? How dare they rape — er, how you say now, *les aborigines americaines?"* "But, my little cabbage," says Henri, "where will it all end? I hear that *les Anglais* are demanding that the committee include the Norman Conquest." "Well, *mon Dieu,* why not?" asks Jean Paul. "It may make it easier for our group, *Croisés pour la justice historique,* to get Muslims on the list for their rallying cry of 'Die, Infidel!' which some revisionists claim was the cry of our forces as they liberated Byzantium and the Holy Land." "I rather hope so," says Marianne, "for then my organization, *Femmes du monde contre les hommes,* will have a better chance to get a listing for the *Rape of the Sabine Women.* You know, Italian men are still insisting that is was merely seduction." "Speaking of that," murmurs Louis, "it's time for my *cinq-a-sept."*

Japery aside, given the sweeping prohibitions elsewhere, the cave-in to pressure of New York publishers seems rather mild. As does the objection to Criticus's negative characterization of U.S. Grant as recorded in the Letters to the Editor in this number of *CPR.* In fact, I am grateful for Mr. Ross's letter: it comes as close to fan mail as a curmudgeon can expect. And it gives Criticus the opportunity to expand a bit on the demeanor of the eighteenth President by calling on the testimony of one who actually saw Grant in (non-military) action. This may be the last time such a thing is allowed in public print, so you will want to savor the words (with original punctuation preserved and some bracketed clarifications by Criticus added) of Robert, Lord Lytton, Viceroy of India, who describes Grant's visit in 1880:

> On their last night at Calcutta General Grant and 'Suite' — with the exception of Mrs G. (who was 'incommoded in her inside') dined with the chief Justice Sir R. Garth and Lady Garth, from whose house they embarked. On this occasion 'our distinguished guest' the double Ex-President of the 'Great Western Republic,' who got as drunk as a fiddle, showed that he could also be as profligate as a lord. He fumbled Mrs A., kissed the shrieking Miss B. — pinched the plump Mrs C. black and blue — and ran at Miss D. with intent to ravish her. Finally, after throwing all the Garths' female guests into hysterics by generally behaving like a must elephant [a male elephant in sexual frenzy — C.], the noble beast was captured by main force and carried *(quatre pattes dans l'air)* [four paws aloft — C.] by six sailors on board the ship which relieved India of his distinguished presence. The marine officer who superintended the carriage of the General from the house to the ship, reports that, when deposited in the public saloon cabin, where Mrs G. was awaiting him with her cock in her eye [*i.e.,* a sharp look — C.] this remarkable man satiated there and then his baffled lust on the unresisting body of his legitimate spouse, and copiously vomited during the operation. If you have seen Mrs Grant you will not think this incredible.

To bring matters up to date, I quote a recent interview with Eugene McCarthy: "Arthur Schlesinger ... said I'd have been a President like Buchanan. That was a hell of a thing to say, because nobody knows what Buchanan was like. If he'd said I'd be like Grant, why, it means I'd have been a drunk ...." McCarthy is no Republican, but neither is he anymore quite a Democrat. He never was a Southerner. But I have no doubt he knows who won the War. CPR

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And The Trumpet Shall Sound

BY LYNN SAMPSON

THE WORLD of classical music can sometimes be like a private club — members only, a closed shop. Although everyone from Zanzibar to Soho knew about the recent collaborations of the world's three top operatic tenors, first at the concert in Rome and not long ago in Los Angeles, it might surprise you to know an even more spectacular event just took place at Long Beach State University. A closely guarded secret, few outsiders even knew it was in the offing. If I don't tell you about it, no one else will.

In 1974, three distinguished musicians met for dinner in Bloomington, Indiana, and formed a plan to create professional guilds that would promote their own musical specialities, disseminate helpful hints to, and provide moral support for, fellow musicians. What became the International Trumpet Guild and the Tubists Universal Brotherhood Association began that evening at the home of a man named Harvey Phillips, who for many years played tuba for Arturo Toscanini in the great conductor's NBC Symphony Orchestra. Phillips, who was then teaching music at the University of Indiana, was joined by trumpet teachers Robert Nagel of Yale and Charles Gorham of Indiana University. Together, they founded these two fraternal organizations to serve the world's top trumpet players and low brass performers (tubas and euphoniums). Well, few outside of the profession knew these organizations even existed, which quietly went about doing what they do. For 20 years, rank and file music lovers have been out of the loop.

Photograph by Keith Ian Polakoff

The time has come to break the story and blow their cover.

Once a year somewhere in the world, one of the most remarkable musical events of all time takes place under the cover of hushed, professional anonymity. It is a "by invitation only" series of workshops and concerts of which few in this supposedly tightly-networked, overly-informed world have ever heard. I can calmly and seriously state that in all my years of attending and reviewing concerts at venues in Europe and America, nothing I have ever experienced was as intense and powerful as what I saw and heard when I crashed this heretofore hermetic gathering last June.

It is called "International Brassfest." What it *is* is the convention of the world's best brass players — trumpets and tubas surely, but trombones, horns, and even ancient cornettos and sackbuts as well. For a few days each year the cream of the cream convene to perform for one another from nine in the morning until eleven each night. During their four days at Long Beach State, they managed to hold 36 master classes and 15 concerts. Concert number 12 was the most powerful and memorable artistic experience I have ever known. The other 14 were not far behind it.

What you have is the world's best symphony and solo players, many teaching brass professors of music from top universities, and an accompanying retinue of outstanding students. The artistically incendiary result is awesome. And it is guarded. As I stood at the ticket desk having my press credentials verified, a forlorn man hugging a trumpet case approached and politely asked: would they please allow his wife to attend the afternoon concert? The official behind the desk was not encouraging

A veteran print and broadcast arts critic, Lynn Sampson hosts "Movies Worth Watching with Lynn Sampson," daily on KCIV-FM, Modesto.

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about her chances of getting in, although the husband was one of the performers. That was the concert that re-ordered my personal hierarchy of great artistic experiences.

After the stellar performances of men and women like the first chair trumpeter of the Philadelphia Symphony, the world's leading expert on late seventeenth century Bolognese trumpet concertos, and the first chair trombonist of the LA Philharmonic; after the rafter-shaking recitals of the Tonight Show's lead trumpeter and the soloist from Stan Kenton's Big Band; after the concert by the world's leading Baroque trumpeter; after all that came something they innocently call "The Festival of Trumpets."

"The Festival of Trumpets" is simply this: thirteen ensembles taking the stage one at a time to perform a wide range of chamber music for trumpets and then all gathering *en masse* to perform one single piece played by everyone. The beautiful interior of brand new Carpenter Hall on the campus of CSU-Long Beach will never see its like again. Neither will I. One hundred and thirteen professional trumpeters stood tightly packed on stage and reached back through 381 years of music history to the San Marco Cathedral of Venice to perform the great "Sonata XX" of Giovanni Gabrieli for five brass choirs. With more than 20 players in each choir, it was a faithful rendering of Gabrieli's tribute to the remarkable acoustics of the great Venetian cathedral of San Marco. On April 25, 1615, he assembled a similar, though smaller, group of musicians and placed them in five equal groups within that monumental edifice — one in the chancel, one in each transept, one at the western door, and one in the choir loft.

In Long Beach, each choir played Gabrieli's polyphonic theme individually in turn. Then came the mammoth "tutti" section with all 113 trumpeters playing at once. The effect was not ear splitting or overdone. I should know for I was sitting dead center in the third row. It was, however, catastrophically stupendous and more powerful emotionally than anything I have ever seen and heard on any stage in all my life. In a few minutes "Sonata XX" was finished, 113 musicians lowered their instruments, and it was suddenly 1996 again.

Brassfest organizers don't exactly *say* they want to keep audiences out. They say they lack funds for advertising, that they have no feasible way of gearing up to attract crowds, and so forth. Maybe. I suspect they simply like the atmosphere they have created, a gathering of, by, and for professional musicians, and that they are not particularly interested in opening it up in ways that could transform things.

But don't despair. Something very like the Long Beach event will happen again next year, as it does every year. They might even relent and let the public in, not just insiders and reporters. All you have to do is somehow find your way to Gothenberg, Sweden, late next spring where the next "International Brassfest," with one hundred-plus trumpeters, will be waiting to blow you away. In the meantime, recordings featuring these same unparalleled musicians are available from Summit Records of Tempe, Arizona: 800/543-5156. CPR

Correspondence

(Continued from page 2)

we cannot count that as incitement to the vandals who long since rendered General Grant's neighborhood so insalubrious. Do they know who's buried there anyway? For them it may be a tough question.

Some specifics on the domestic manners of General Grant are further discussed in this issue in my regular column (see page 24). Lincoln and Sherman will have to wait, perhaps forever, as I have just learned that the editor of this journal is a scalawag, hence capable of almost any iniquity including censorship.

Not a scalawag, but a son of the South who mourns the tragedy that Southerners sacrificed much good rather than give up defending indefensible slavery. — Editor

Some Trick

Tim W. Ferguson (Press Watch, *CPR*, May/June) referred to a proposed ballot measure "requiring competitive bidding of public projects over a certain size. The idea sounded okay, but was this some trick a special interest was up to?" His skepticism is well founded. The initiative is sponsored by a state employees union, Professional Engineers in California Government (PECG). We expect PECG to submit its signatures to the counties any day.

Buried in the text of the initiative is language that would devastate private engineering, architectural and other consulting firms in California, create a *de facto* state monopoly on these services, and impose yet additional bureaucratic delays on the delivery of many needed private and public projects. The initiative expressly requires the preparation and filing of papers with the State Controller and obtaining the Controller's permission before procuring engineering, environmental, architectural, and surveying consulting services. It contains a "Stacked Deck," so that it is unlikely that the Controller would ever give that permission.

An important point is that this initiative impacts much more than just traditional state projects, such as Caltrans projects and state buildings. It also impacts local agency projects, regional agency projects, and private projects in California. PECG has already spent a lot of money qualifying the initiative for the ballot and will likely spend far more to pass it. We expect that PECG will wait until right before the election and then launch a very misleading media campaign.

Paul J. Meyer, executive director
Consulting Engineers and Land Surveyors of California

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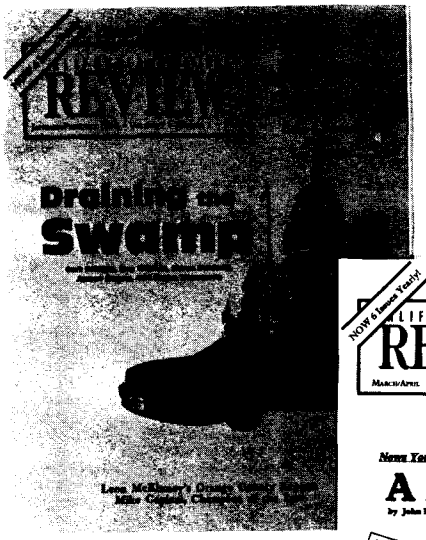

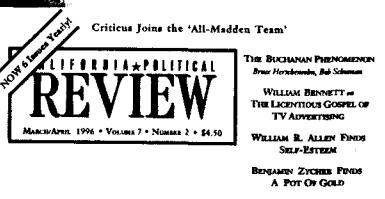
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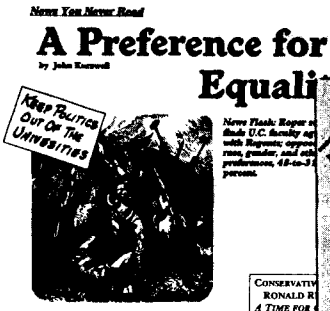

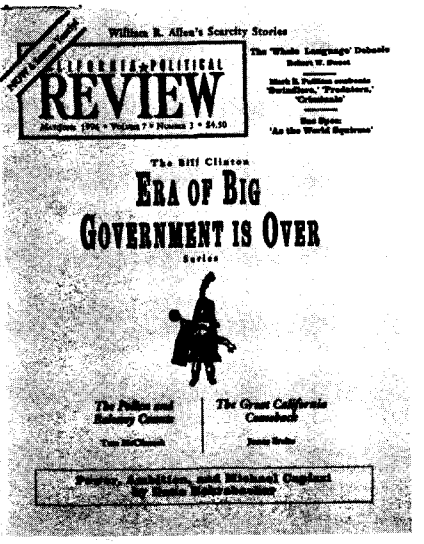

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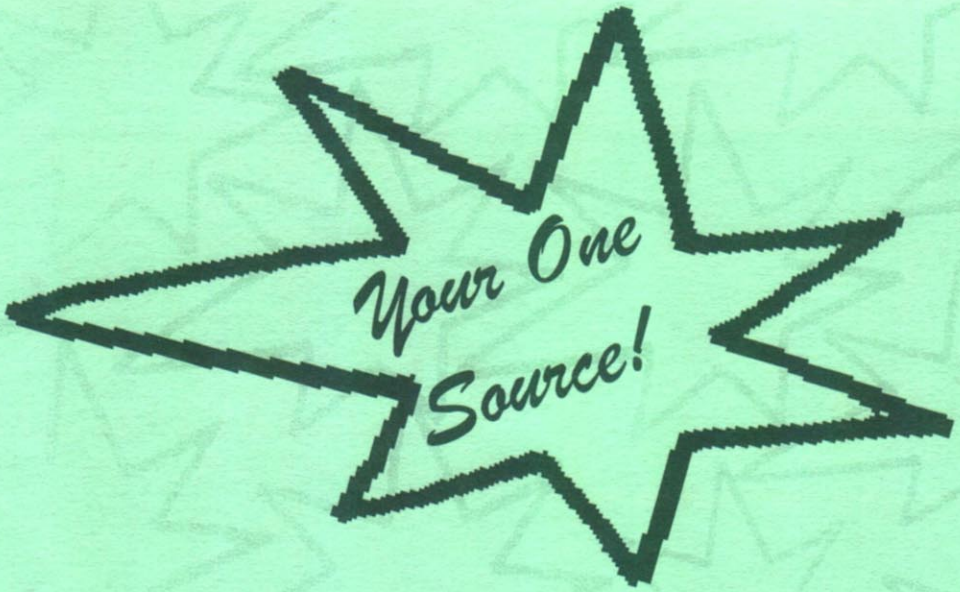

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